

Insights

Practically Speaking: A Series of Practical Tips for Employers in Navigating COVID-19

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Part 1: Key Terms Related to a Business Slowdown or Closure

No matter the line of business, every employer has been impacted by the Coronavirus of 2019 (COVID-19). To help employers navigate these rocky waters, the Labor and Employment team at Krieg DeVault LLP has developed a series of short articles focusing on key concepts and practical tips. Our first "Practically Speaking" article focuses on common terms related to a business slowdown or closure and key considerations for decision makers.

COMMON TERMS RELATED TO A BUSINESS SLOWDOWN OR CLOSURE

Furloughs and layoffs and reductions in force ... oh, my! Dorothy in *The Wizard of Oz* had the lion, scarecrow, and tin man to help her navigate the yellow brick road, but employers often feel alone when deciding how to best communicate with their employees regarding a slowdown or closure. The following is a summary of common terms you might encounter on your journey and a few tips to help you navigate.

Furlough

The term "furlough" may have different meanings¹, based on context. In an employment scenario, it typically refers to a **mandatory, temporary slowdown or cessation of work that is unpaid and not the fault of the employee.**

When furloughed employees' hours are reduced, affected employees retain their job position but work fewer hours and receive an overall reduction in pay. Employers implementing a reduced hours or day-by-day furlough must be careful to maintain compliance with exempt and non-exempt employee pay requirements under the Fair Labor Standards Act (FLSA)².

Due to complexity involved in administering reduced hours or day-by-day furloughs, most employers choose to furlough employees in week-long or multi-week (or month) increments. Under this method, furloughed employees still retain their jobs over the furlough period but do not receive wages or salary. A furlough is appropriate when an anticipated business closure or work slowdown is temporary, the employment relationship continues, and operations are expected to return to normal at the end of the furlough period.

Furloughs provide enhanced flexibility for employers seeking to control costs or navigate a temporary downturn in available work, but they also can raise an employer's risk profile. Employers can choose to furlough entire departments or divisions, or they can choose to target certain non-essential employees for furlough. The furlough does not need to be applied uniformly; however, employers should ensure that employment decisions are not discriminatory and are undertaken in compliance with all applicable local, state, and federal laws³ and contractual obligations, such as collective bargaining agreements.

Furloughed employees may be eligible for unemployment compensation, and they may continue to receive employer-provided benefits, subject to the terms and conditions of benefit plans, although sometimes at an increased cost to the employee. A furlough may or may not impact accrual of time for purposes of benefits eligibility, retirement, or other entitlements. Under certain circumstances, a lengthy furlough or one that turns into a permanent layoff may also trigger a notice obligation under the **WARN Act**.

Layoff

A layoff generally means⁴ to **"terminate or suspend (from working) an employee or group of employees through no fault of the employee."** This broad term encompasses both (a) temporary layoff without separation from employment, also called a furlough; and (b) permanent layoff with separation from employment, also called a reduction in force. Layoffs, whether temporary or permanent, also provide employers with a benefit, enhanced flexibility, and a cost, increased risk.

Unlike a temporary layoff or furlough, a permanent layoff severs the employment relationship and ends all conditions and benefits of employment. Employees who are otherwise eligible typically would be entitled to receive unemployment benefits, and in some circumstances there may be additional notice/training entitlements. In addition, an announced permanent layoff creates a sense of finality that can lead to difficulty in recruiting laid-off employees back to work. Employers contemplating a permanent layoff should pay careful attention to any special circumstances (e.g., collective bargaining agreements, employment contracts, state or federal WARN applicability) that may impact the notice period or terms and conditions of ending employment. Employers wishing to offer a separation package should be careful to consider any special requirements, such as review and revocation time periods required under the Older Workers Benefit Protection Act⁵.

Reduction in Force

A reduction in force results in a **decrease in an employer's headcount of employees**, whether through attrition, permanent layoff, or both. Elimination may occur through natural or voluntary attrition, such as not replacing an employee who retires or resigns on his/her own timeline or offering a voluntary separation or early retirement package to certain employees (sometimes called a "buyout"), or it may be planned and executed as a permanent layoff. Some employers implement a permanent layoff when natural or voluntary attrition does not achieve desired reductions.

As in a permanent layoff, reductions in force result in affected employees' separation from employment, although the rights and entitlements of those employees will depend on whether the separation is voluntary or involuntary. Generally speaking, employees who voluntarily separate from employment, whether through resignation,

retirement, or accepting a voluntary separation package will not be entitled to unemployment benefits or mandatory notice/retraining provisions under WARN, although employers should carefully analyze potential obligations and impact with respect to each employee (or group of employees) who is subject to a reduction in force.

Termination

Termination means an **involuntary, permanent end to employment, regardless of reason**. Reasons for termination are varied, and they may be the fault of the employee, the result of a permanent layoff or reduction in force, or simply the will of the employer (assuming otherwise lawful motivations and an at-will arrangement). In any case, an employer seeking to terminate one or more employees should analyze the facts and consider all potential legal and contractual obligations⁶. Depending on circumstances, a terminated employee may be entitled to receive additional pay or benefits pursuant to law or contract. There may also be specific circumstances which entitle a terminated employee to unemployment benefits, continued health insurance coverage, or other post-employment entitlements. The term "termination" often carries some stigma among employees, as it is sometimes assumed to mean "terminated with cause" or "fired," which is not always the case.

KEY CONSIDERATIONS FOR DECISION MAKERS

- **Determine Appropriate Action:** Why is one of the above employment actions necessary? Is it to control costs? Is business slowing? Is the situation expected to be temporary or permanent? Is there some way to avoid a mandatory slowdown/shutdown or confine it to certain departments or areas? Could a desired reduction in force be accomplished via natural or voluntary attrition?
- **Identify Relevant Jurisdiction(s):** What kind of employer are you (e.g. private company, not-for-profit organization, public employer)? Where are impacted employees located? Which local, state, and federal laws may apply?
- **Identify Potential Discriminatory Effect:** Discrimination⁷ is prohibited under myriad local, state, and federal laws. Will your proposed action disproportionately impact a particular group of workers (e.g. over 40, sex, or workers of a particular race or national origin)? Even if the impact on those groups is not intended, it can still result in potential liability.
- **Consider Potential WARN Act Applicability:** Review state and federal WARN Act requirements to determine if these are (or may be) triggered.

- **Analyze Existing Obligations to Employees:** Is your workforce subject to a collective bargaining agreement? Do any potentially impacted employees have employment contracts, or are they otherwise not at-will employees?
- **Analyze Benefits Impact:** Consider impact of the planned employment action on benefits for impacted and non-impacted employees. Will employees be entitled or permitted to maintain existing benefits, including post-separation health insurance eligibility through Consolidated Omnibus Budget Reconciliation Act (COBRA) coverage? Will employee out of pocket costs for those benefits change, and do you as the employer wish to subsidize those costs or offer a cash payment to help defray those costs? If so, will any non-discrimination requirements be triggered in your employee benefit plans?
- **Consider Potential Unemployment Eligibility:** While eligibility for and aware of state or federal unemployment benefits are determined by the responsible agency (such as Indiana's **Department of Workforce Development**), employers can encourage employees to apply for such benefits and should have a general understanding of the impact of certain employer decisions on potential eligibility.
- **Choose Terms Carefully:** From the very beginning, be intentional about the language you choose, and understand that some terms may have both a technical meaning (such as a meaning set forth in a statute or regulation) and a colloquial meaning based on common usage. Employers should adopt a transparent, accurate, and consistent nomenclature.
- **Develop a Timeline and Communication Plan:** Decide how much information will be communicated, and when. Develop standard documents and dissemination methods. How and when will employees learn of the action? Who else must be notified (e.g. government agencies or insurers)? Who will answer questions regarding pay/benefits/next steps and coordinate/implement the employment action?

CONCLUSION

Like Dorothy in Oz, employers may find themselves in unfamiliar territory as they navigate COVID-19 related slowdowns and closings, which may have been previously unthinkable. Krieg DeVault's **COVID-19 Task Force** and **Labor and Employment team** stand ready to partner with you in making these important decisions impacting your

business and your employees.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

[1] In the military, for example, a "furlough" means voluntary leave granted by a commanding officer to a subordinate. Douglas Harper, Furlough, Online Etymology Dictionary, available at <https://www.etymonline.com/word/furlough>. This can cause confusion for employees who have heard the term used in a different context.

[2] U.S. Department of Labor, Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues, Topical Fact Sheet Index, available at <https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs>.

[3] For example, public employees may be subject to specific requirements while on furlough. See, e.g., 29 C.F.R. 541.710.

[4] TheLaw.com LLC, Layoff, TheLaw.com Law Dictionary & Black's Law Dictionary 2nd Ed., available at <https://dictionary.thelaw.com/layoff/>.

[5] U.S. Equal Employment Opportunity Commission, Understanding Waivers of Discrimination Claims in Employee Severance Agreements, EEOC Guidance, available at https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

[6] For example, some employees may have rights to due process in connection with a termination, such as those subject to a collective bargaining agreement or government employees.

[7] U.S. Equal Employment Opportunity Commission, Avoiding Discrimination in Layoffs or Reductions in Force (RIF), Small Business Checklists, available at https://www.eeoc.gov/employers/smallbusiness/checklists/avoiding_discrimination_in_layoffs.cfm